[53] *See* Spencer E. Amdur & David Hausman, Responses, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. FORUM 49, 52 (2017).

[54] *See* Riley, *supra* note 1.

[55] *See* Bray, *supra* note 36 at 461-462.

[56] *Id*.

[57] Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615, 654 (2017).

[58] California v. Azar, 911 F.3d 558, 583 (9th Cir. 2018).

[59] Frost, *supra* note 18, at 1109.

[60] Carroll, *supra* note 37, at 2029.

[61] *See*, Siddique *supra* note 6, at 2142-44.

[62] *Id*.

[63] *Id*.

[64] *Id*. at 2145-2146.

[65] Federalist Soc'y, *The Eleventh Annual Rosenkranz Debate: Universal Injunctions [2018 National Lawyers Convention]*, YOUTUBE (Jan. 3, 2019), https://www.youtube.com/watch?v=76XJBp51OHM.

[66] *See* Memorandum from Att'y Gen., *supra* note 13, at 5-6.

[67] *Id*.

[68] *See* City of Chicago v. Sessions, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part).

[69] Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. (2018).

[70] FED. R. CIV. P. 65; Siddique *supra* note 6.

[71] Frost, *supra* note 18.

[72] Erickson, *supra* note 27.

[73] City of Chicago v. Sessions, 888 F.3d 272, 297 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part).

Applicant Details

First Name	**Kathleen**
Middle Initial	**M**
Last Name	**Ritter**
Citizenship Status	**U. S. Citizen**
Email Address	**kmr2200@columbia.edu**
Address	**Address** Street **1330 Shore District Dr., Apt 2433** City **Austin** State/Territory **Texas** Zip **78741** Country **United States**
Contact Phone Number	**2145876688**

Applicant Education

BA/BS From	**Williams College**
Date of BA/BS	**June 2016**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 21, 2020**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Williams Institute Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Tani, Karen
ktani@law.upenn.edu
Underhill, Kristen
kunderhill@law.columbia.edu
8608787335
Johnson, Olati
olati.johnson@law.columbia.edu
212-854-8387

References

The Honorable J. Brett Busby
Justice, Supreme Court of Texas
Email: Brett.Busby@txcourts.gov
Phone: 512.463.1335

Ingrid Gustafson
Assistant Corporation Counsel, Appeals Division, New York City Law Department
Email: igustafs@law.nyc.gov
Phone: 212.356.0853

Scott Shorr
Assistant Corporation Counsel, Appeals Division, New York City Law Department
Email: sshorr@law.nyc.gov
Phone: 212.356.0852

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Katie Ritter
1330 Shore District Dr., Apt 2433
Austin, TX 78741
214-587-6688

The Honorable Indira Talwani
U.S. District Court for the District of Massachusetts
John Joseph Moakley U.S. Courthouse
1 Courthouse Way Suite 2300
Boston, MA 02210

Dear Judge Talwani:

I am a graduate of Columbia Law School and I am writing to express my interest in a clerkship in your chambers for the term beginning in October 2022. I am currently clerking for Justice Brett Busby on the Supreme Court of Texas, and then plan to continue building a litigation career back on the east coast. I spent my undergraduate years in Massachusetts, and would love the chance to return to the state and contribute to your work for the court.

During my time at Columbia, the opportunities I pursued provided me with both breadth and depth in legal research and writing. As a Research Assistant for Professor Olatunde Johnson, I wrote memoranda on current legal scholarship regarding federal statutory and Constitutional issues. As a moot court participant and coach, I wrote and edited appellate briefs. And, as both a Legal Fellow at Human Rights Campaign and a Summer Litigation Associate at Proskauer, I wrote and assisted in writing reply briefs, complaints, policy memos, and legislative testimony. Additionally, I worked during law school as a judicial intern at the District Court for the Southern District of New York in Judge Paul Engelmayer's chambers, as well as at the Second Circuit Court of Appeals in Judge Gerard Lynch's chambers, so I have experience with both federal and state as well as district and appellate courts.

After graduating, I spent eight months on a full-time pro bono secondment from Proskauer with the Appeals Division of the New York City Law Department. At the Law Department, I was responsible for deciding appellate strategy, researching and drafting appellate briefs, and communicating with city agencies on a wide variety of cases. As a clerk for the Supreme Court of Texas, I write bench and submission memos that are distributed to the entire Court, produce petition and case summaries, and draft opinions. It has been a privilege to gain appellate experience this year with SCOTX, but I am eager to gain more trial litigation experience and am excited by the fast-paced, more party-focused environment of a district court. When my clerkship is over, I plan to continue forging a career in litigation practice.

I have included a resume, transcripts, writing sample, and letters of recommendation. I look forward to hearing from you.

Respectfully,
Katie Ritter

KATIE RITTER
1330 Shore District Dr., Apt. 2433, Austin, TX 78741 • 214-587-6688 • kmr2200@columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY
J.D. received May 2020
Honors: Harlan Fiske Stone Scholar 2017-2018, 2018-2019, 2019-2020
Myra Bradwell Award (for best student Note on women's issues and the law)
Publication: *We Are Not Struck by Blindness: The Establishment Clause and Religiously-Motivated State Preemption of Municipal Non-Discrimination Law*, 38 Colum. J. Gender & L. No. 1 (Spring 2020)
Activities: *Columbia Human Rights Law Review*, Articles Editor
Williams Institute Moot Court, Competition Team Member 1L, Coach 2L
Law Revue, Director
Teaching Fellow for Professor Tani (Torts), Fall 2018

UNIVERSITY OF OXFORD, ST. HUGH'S COLLEGE, Oxford, United Kingdom
MSt in the History of Art and Visual Culture, received July 2017

WILLIAMS COLLEGE, Williamstown, MA
B.A., *cum laude,* received May 2016
Major: Art History, Political Science Honors:
Highest Honors in Art History
Arthur B. Graves Prize for Essay in Art History (for senior thesis)

EXPERIENCE

SUPREME COURT OF TEXAS Austin, TX
Law Clerk, Chambers of Justice Brett Busby September 2021 - present
Draft opinions on behalf of Justice Busby, write petition review memos for entire Court recommending whether to grant or deny cases, write bench memos for entire Court, help Justice Busby prepare for oral argument.

NEW YORK CITY LAW DEPARTMENT, APPEALS DIVISION New York, NY
(On secondment from Proskauer) January 2021 – August 2021
Special Assistant Corporation Counsel
Handled appellate cases on behalf of the city of New York. Determined appellate strategy, researched and wrote appellate briefs.

COURT OF APPEALS FOR THE SECOND CIRCUIT New York, NY
Intern, Chambers of Judge Gerard E. Lynch September 2019 – December 2019
Conducted legal research and prepared bench memos for Judge Lynch for cases on appeal. Presented cases to clerks and Judge Lynch before sittings. Attended and observed oral arguments.

PROSKAUER ROSE, LLP New York, NY
Summer Associate May 2019 – July 2019
Conducted legal research for white collar sentencing proceeding. Prepared draft materials for bankruptcy litigation. Attended and took notes on collective bargaining negotiations. Wrote memoranda on a variety of legal and factual issues for ongoing matters.

SOUTHERN DISTRICT OF NEW YORK New York, NY
Intern, Chambers of Judge Paul A. Engelmayer January 2019 – May 2019
Worked with clerks and the Judge on drafting orders and opinions. Conducted research for ongoingcases. Attended and observed trials and hearings over which the Judge presided.

HUMAN RIGHTS CAMPAIGN Washington, D.C.
McCleary Law Fellow May 2018 – July 2018
Worked with HRC attorneys, lobbyists, and organizational allies on a wide range of projects including organizational contracts, comments on proposed regulations, model legislation, and issue testimony for Congress.

COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

NAME: Kathleen Martha Ritter
SSN#: XXX-XX-5588
SCHOOL: SCHOOL OF LAW

DEGREE(S) AWARDED: Juris Doctor (Doctor of Law) DATE AWARDED: May 20, 2020 PROGRAM: LAW

PROGRAM TITLE: LAW

HARLAN FISKE STONE SCHOLAR-FIRST YEAR ENDING MAY 18
HARLAN FISKE STONE - SECOND YEAR ENDING MAY 19
HARLAN FISKE STONE SCHOLAR-THIRD YEAR ENDING MAY 20
MANDATORY PRO BONO, 40 HOURS

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Fall 2017				
LAW	L 6101	CIVIL PROCEDURE	4.00	A-
LAW	L 6113	LEGAL METHODS	3.00	CR
LAW	L 6115	LEGAL PRACTICE WORKSHOP I	2.00	P
LAW	L 6118	TORTS	4.00	A
LAW	L 6133	CONSTITUTIONAL LAW	4.00	B+
Spring 2018				
LAW	L 6105	CONTRACTS	4.00	B+
LAW	L 6108	CRIMINAL LAW	3.00	B
LAW	L 6116	PROPERTY	4.00	B+
LAW	L 6121	LEGAL PRACTICE WORKSHOP I	1.00	HP
LAW	L 6169	LEGISLATION AND REGULATIO	3.00	A-
LAW	L 6874	WILLIAMS INSTITUTE MOOT C	0.00	CR
Fall 2018				
LAW	L 6204	ADMINISTRATIVE LAW	4.00	A-
LAW	L 6276	HUMAN RIGHTS	3.00	A-
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	0.00	CR
LAW	L 6675	MAJOR WRITING CREDIT	0.00	CR
LAW	L 6822	TEACHING FELLOWS	4.00	CR
LAW	L 6867	INDEPENDENT MOOT CT COACH	1.00	CR
LAW	L 8996	S THE CONSTITUTION	2.00	A-

L6822 WITH TANI, KAREN

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Spring 2019				
LAW	L 6341	COPYRIGHT LAW	4.00	B+
LAW	L 6355	HEALTH LAW	4.00	A-
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	0.00	CR
LAW	L 6661	EXT:FED CT CLERK SOUTHERN	1.00	CR
LAW	L 6661	EXT:FED CT CLERK SDNY-FLD	3.00	CR
LAW	L 6867	INDEPENDENT MOOT CT COACH	1.00	CR
Fall 2019				
LAW	L 6241	EVIDENCE	3.00	B+
LAW	L 6425	FEDERAL COURTS	4.00	B+
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	1.00	CR
LAW	L 6664	EXTERNSHIP:FED APPELLATE	1.00	CR
LAW	L 6664	EXTERNSHIP:FED APPELLATE	3.00	CR
LAW	L 8990	S CUR ISS CIVIL LIBERTIES	2.00	A
Spring 2020				

Due to the COVID-19 pandemic, Mandatory Pass/Fail grading was in effect for all regular, full-term courses for the spring 2020 semester.

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
AHIS	GR 6408	ORIGINS OF MOD VISUAL CUL	3.00	P
LAW	L 6293	ANTITRUST AND TRADE REGUL	3.00	CR
LAW	L 6625	JOURNAL OF GENDER AND LAW	1.00	CR
LAW	L 6655	HUMAN RIGHTS LAW REVIEW	1.00	CR
LAW	L 6689	SUPERVISED RESEARCH: CRSE	2.00	CR
LAW	L 8671	S ART, CULTURAL HERTIAGE/	2.00	CR
LAW	L 9039	S LEG & ETHCL OBLGTNS COM	2.00	CR

G6408 2 LAW POINTS
L6689 WITH DREYER, ELYSE

This official transcript was produced on FEBRUARY 17, 2021.

SEAL OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

Barry S. Kane
Associate Vice President and University Registrar

TO VERIFY AUTHENTICITY OF DOCUMENT, THE BLUE STRIP BELOW CONTAINS HEAT SENSITIVE INK WHICH DISAPPEARS UPON TOUCH

Katie Ritter
Williams College
Cumulative GPA: 3.79

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Aspects of Western Art	Eugene Johnson	A-	1	
Calculus 1	Edward Burger	B	1	
Elementary Italian	Anthony Nicastro	B+	1	
Introduction to International Relations	James McAllister	A-	1	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Aspects of Western Art	Eva Grudin	A	1	
Elementary Italian	Anthony Nicastro	B+	1	
Muscovy and the Russian Empire	Anna Fishzon	A-	1	
Psychological Disorders	Laurie Heatherington	A-	1	

Dean's List

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Photography in the Middle East	Holly Edwards	A	1	
The Ethics of Fiction	Bernie Rhie	A	1	
The Tropics: Biology and Social Issues	Joan Edwards	A	1	
Visual Politics	Mark Reinhardt	A	1	

Dean's List

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Image-Making	Holly Edwards	A	1	
International Law	Cheryl Shanks	B+	1	
Introduction to the Novel	Bernie Rhie; Stephen Fix	A	1	
The Wilsonian Tradition	James McAllister	A-	1	

Dean's List

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Italian Renaissance: Venice and Florence	Jasmie Chiu	A	1.6	
Methods of Art History	Ros Holmes	A	1.6	
Social Policy	Zlata Bruckhauf	A-	1.6	

Study Abroad at Oxford University, Exeter College as part of the Williams-Exeter Programme at Oxford

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Egyptian Art and Architecture	Leire Olabarria	A-	1.6	
Film Theory	Benedict Morrison	A	1.6	
International Relations in the Cold War	Kai Hebel	A-	1.6	

Study Abroad at Oxford University, Exeter College as part of the Williams-Exeter Programme at Oxford

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Elementary Statistics and Analysis	Bernhard Klingenberg	A	1	
Film Photography	Aida Laleian	A-	1	
Policy Making Process	Cathy Johnson	A-	1	
Twentieth Century Art	Catherine Howe	A	1	

Dean's List

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Art History Thesis Seminar	Ondine Chavoya	A	1	
Michaelangelo: Biology, Myth, and History	Stefanie Solum	A-	1	
Political Romanticism	Walter Johnston	A	1	
Senior Seminar in International Relations: International Organizations	David Traven	A+	1	

Dean's List

Honors:
Cum Laude
Highest Honors in Art History

Prizes:
Arthur B. Graves Essay Prize in Art

Thesis: Dada in Disguise: Primitivism, Masks and Identity in the works of Marcel Janco and Hannah Höch

Grading System Description

A+ 4.33 A 4.00 Excellent A- 3.67
B+ 3.33 B 3.00 Good B- 2.67
C+ 2.33 C 2.00 Fair C- 1.67
D+ 1.33 D 1.00 Passing D- .67

Williams does not allocate courses based on credit hours. Instead, each course is one discrete unit, and four courses per semester is considered a full-time course load.

UNIVERSITY OF PENNSYLVANIA

April 28, 2022

The Honorable Indira Talwani
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Re: Clerkship Applicant Kathleen Ritter

Dear Judge Talwani:

I write this letter in enthusiastic support of Kathleen Ritter's application to be your law clerk. Katie, as I know her, was one of my teaching assistants in the fall semester of 2018, when I taught Torts at Columbia Law School. She is currently clerking for Justice Brett Busby on the Supreme Court of Texas. From my many interactions with Katie at Columbia, as well as from my familiarity with her excellent law school and post-graduation record, I feel confident in recommending her to you. I hope that you will give her application your close consideration.

Katie came to be my teaching assistant in a manner that speaks highly of her. When I arrived at Columbia Law School as a visiting professor, I was delighted to learn that I could hire several second-year students to serve as my teaching assistants; I quickly reached out to another Torts professor (Kristen Underhill) to get recommendations for names from the rising 2L class. Katie was on Professor Underhill's short list. Regarding Katie in particular, Professor Underhill noted that she was a "very strong writer" who had previously worked in a student writing help center. After reviewing Katie's materials, I had one additional reason for pursuing her: she came to law school with a Master's Degree in the History of Art and Visual Culture at Oxford, suggesting to me that she was a flexible and creative thinker who might be especially good at helping students see the big picture. I was delighted when Katie accepted my invitation to be one of my four student TAs.

I had a close working relationship with my TAs and asked a lot of them. For instance, in the first weeks of class, I asked my TAs to review my syllabus and help me make adjustments that Columbia students might find particularly valuable. Throughout the semester, I relied on them to design and teach biweekly review sessions, where they would cover the key points from the past half-dozen classes, answer student questions, and help students work through practice materials. In addition, the TAs held regular "office hours" and made themselves available for individual meetings with students. During the midpoint of the semester, the TAs administered a practice midterm exam and gave over 100 students individualized feedback.

Katie excelled in all aspects of the job, whether it was interfacing with students or creating materials for the review sessions. She was also unfailingly professional. I could count on her to show up to every class on time (my TAs attended all class sessions), meet deadlines, and respond promptly and graciously to constructive feedback (for example, when I asked the TAs to tweak something in the teaching materials they created for a particular review session). I am sure that these traits helped her excel after graduation, during her time with the New York City Law Department and now in the chambers of Justice Busby.

Katie was never my student, but I would be remiss if I did not call your attention to the excellent record she compiled while in law school. As you may know, Columbia imposes a strict grading curve; a record like Katie's is quite strong (as indicated by her designation as a Harlan Fiske Stone Scholar). Katie's writing-related accomplishments are particularly noteworthy. Not only was her student note selected for publication, but it also won an award for the best Note on women's issues and the law. As you consider Katie's academic accomplishments and what they signal, you should also consider that Katie compiled this record while participating in a full and challenging slate of extracurricular activities—not only TAing for me, but also working as a research assistant for another professor, participating in a moot court competition, and helping run the Columbia Human Rights Law Review. On the lighter side (but requiring no less time), she directed the Law Revue, "the preeminent site for musical satire at Columbia Law School" and a great source of community-building.

I appreciate that musical satire may not be your top priority, so allow me to emphasize just one more aspect of Katie's record: her wealth of practical experience, including (by the time she reaches you) positions in three judicial chambers. Complementing her litigation-related experience is experience with legislation and regulation (at the Human Rights Campaign). When I consider this alongside Katie's outstanding writing skills, I am confident that she will bring tremendous value (and zero risk) to your team.

I will conclude with some thoughts about what I think Katie would be like as a part of your chambers and a feature of your day-to-day life. In my experience, she is a pleasure to be around—smart, kind, and earnest. (I was not surprised when I learned that she grew up in Texas and has family in the Midwest, areas of the country that I associate with personal warmth.) She is also very interesting to talk to, thanks to her unusual (for a lawyer) background in Art History. I suspect that you would really enjoy her.

Please do not hesitate to be in touch if there is anything else I can do to be helpful to you.

Sincerely,

Karen Tani - ktani@law.upenn.edu

Karen Tani

Seaman Family University Professor
Professor of Law / Associate Professor of History
ktani@law.upenn.edu

April 28, 2022

The Honorable Indira Talwani
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Dear Judge Talwani:

I am very pleased to recommend Kathleen (Katie) Ritter for a clerkship in your chambers. I met Katie in the fall of 2017 when she enrolled in my 1L Torts class, which was a class of more than 100 students. I subsequently worked with Katie in the Spring of 2019 as a student in my 4-credit Health Law course, which enrolled nearly 50 students. In both courses, Katie distinguished herself early and often in her class participation, and her exams have been of top-notch quality in her legal writing, analytical skills, and thorough attention to detail. Katie's skills in mastering and using legal doctrine, thinking through the policy implications of legal rules, and navigating professional environments with poise and confidence will serve her well in a clerkship position.

Katie was an early standout in my Torts course, where she demonstrated frequent and thoughtful class participation and excellent preparation for cold-calling questions. Katie was invariably ready for cold calls, which happened at least once every two weeks, and her voluntary participation consistently reflected deep engagement with the objectives of the tort system and social implications of legal rules. Katie also put in extra effort throughout the course, seeking out additional preparation and discussion in office hours with me and optional issue spotter practice sessions with my teaching fellows. Katie's exam was exceptional and reflected her high engagement; Columbia Law grades 1L courses on a tight and mandatory curve, with only 6-11% of students receiving A marks. Katie received one of these grades, reflecting strong performance on the issue spotter and policy analysis portions of the exam. Katie was well above most of her peers on the issue spotter, identifying a large number of issues with high accuracy and excellent citation practices; her work was notable for its thorough analysis and clarity of organization. Katie's policy questions (on public nuisance actions and tort actions for emotional distress) showed the characteristic depth of thought that she had displayed throughout the semester, and they were notable for elegant writing and mastery of the functions of the tort system.

Based on Katie's written and in-class performance in my course, I thought she would be an excellent teaching fellow for a future Torts course. She is approachable and engaged with her peers, and her exam reflected a high capacity to explain materials clearly, to appreciate the overall goals of the torts system, and to master doctrinal nuances across a range of areas. She also had experience working as a writing tutor at Williams, which was visible in the skill with which she organized her exam essays and issue spotter work. I was glad to recommend Katie to visiting professor Karen Tani to assist in her Torts course this past fall, and I would have hired Katie myself if I had had additional spaces.

Last year, I worked with Katie again as a student in my Health Law course. Katie's work in this class again demonstrated her strong writing and capacity for verbal communication and confident in-class performance. Katie was an engaged and active contributor in both cold calls and voluntary discussions, particularly with respect to her interests in disparities, access to care, and gender-based differences in access to quality medical care. On her exam, Katie again displayed her talent for organized and effective writing, reflecting a good ear for language and keen attentiveness to applying doctrine accurately and making persuasive policy arguments. Katie's responses to policy questions on the exam—this time about state responses to the potential unconstitutionality of the ACA, and about recent developments in conscience protections for healthcare providers—were exceptional, and her issue spotter was a solid performance in accuracy and number of doctrinal problems identified. Katie's A- mark was a strong performance given the rigor of our curve, and I think her work in both courses reflect a level of skill in writing, verbal communication, professionalism, and legal analysis that will make for a successful clerk.

Katie will also benefit greatly from an opportunity to clerk, and exposure to a range of legal areas through clerking will be a tremendous asset to her long-term goals in law teaching. She has had a preview of clerking through her externship in the Southern District of New York, and would be entering the clerkship with the ability and dedication to excel in chambers. Katie performs well under pressure and handles competing demands on her time skillfully, and I have found her to be graceful and communicative in seeking feedback on her work. She is also an interesting, insightful, and collegial presence among her peers, and she has a confident sense of self—gained in part, perhaps, through her successful graduate work in art history before law school. I think she would be a supportive and collaborative addition to any group of clerks, and I believe that she will do excellent work in the clerkship role.

In sum, I am glad to recommend Katie for a clerkship position, and I would be pleased to discuss her further if it would be of interest. Many thanks for your consideration.

Best wishes,

Kristen Underhill, J.D., D.PHIL.
Associate Professor of Law
Columbia University School of Law
kunderhill@law.columbia.edu

212-854-9371

April 28, 2022

The Honorable Indira Talwani
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 4-710
Boston, MA 02210-3002

Dear Judge Talwani:

I am writing to enthusiastically recommend Kathleen Ritter for a clerkship. Kathleen, known as “Katie,” is a top-notch writer and researcher, and she possesses strong analytical skills. She is also enthusiastic, hardworking, and amiable. She is currently clerking on the Supreme Court of Texas and I am confident that she would do excellent work in your chambers.

I supervised Katie’s note on state preemption of local anti-discrimination laws in the Fall of 2018. The issue of state laws preempting the ability of cities to regulate in the area of environ-mental, health, labor, and civil rights has commanded the attention of lawyers, policymakers, and scholars in recent years. Katie took on a distinct aspect of this issue. She examined the extent to which certain state preemption laws were sufficiently religiously motivated such that they might run afoul of the Establishment Clause. Specifically, Katie examined Arkansas’s preemption of a municipal ordinance preventing discrimination on the basis of sexual orientation. Her note was well-researched and persuasively argued. Katie first took on the challenging task of sorting through the Supreme Court’s various doctrines in Establishment Clause cases. She then did a careful case study of whether Alabama’s recent law preempting municipalities from enacting laws prohibiting discrimination on the basis of sexual orientation was lawful under the distilled doctrine. Katie persuasively presented the doctrinal arguments on both sides, and did a careful study of the legislative record and history of the state law. Her arguments were nuanced with regard to both the doctrinal questions and the underlying policy debates. The final note show-cases Katie’s superb analytical capacities, her scrupulous research skills in both caselaw and statu-tory research, and her clear and engaging writing. In addition, working with Katie on the note was a pleasure. She turned her drafts in early, made effective use of our meetings, and was re-sponsive to feedback. She was also pleasant and gracious throughout the process. The note was one of very few selected for publication by the Columbia Journal of Gender Law.

Katie has additional experience in research, writing, and advocacy that will serve her well in a clerkship. While she was at Columbia, she conducted excellent research for me on methods of proofing intent in recent equal protection cases. Katie’s writing, organization, and analysis were all very high-quality. She was a successful participant in the Williams Institute Moot Court in her first year of law school, and went on to coach prizing winning moot court teams She has also performed very well in a range of courses particularly relevant to a clerkship including civil pro-cedure, administrative law, advanced constitutional law, and legislation/regulation. She has sig-nificant experience in clerkship settings. In addition to her current clerkship on the Texas Su-preme Court, Katie served as an intern on both the Southern District of New York, and the Sec-ond Circuit.

In short, I believe that Katie will make an excellent clerk. If I can provide additional in-formation in support of Katie’s application, please contact me at ocj2102@columbia.edu.

Respectfully,

Olatunde C.A. Johnson
Jerome B. Sherman Professor of Law

Olati Johnson - olati.johnson@law.columbia.edu - 212-854-8387

Katie Ritter
1330 Shore District Dr., Austin, TX 78741 • 214-587-6688 • kmr2200@columbia.edu

This writing sample is a draft of an opinion written while I was a judicial intern in the chambers of Judge Paul A. Engelmayer on the United States District Court for the Southern District of New York. The opinion concerns a motion for leave to amend a complaint in a trademark dispute. This sample is being distributed with the permission and knowledge of Judge Engelmayer and has not been revised by Judge Engelmayer or his clerks.

Khaled M. Khaled, a hip-hop music mogul, and ATK Entertainment, Inc. ("ATK"), have filed a motion for leave to file an amended complaint. Dkt. 33. The existing complaint asserts eight causes of action against defendants Curtis Bordenave and Business Moves Consulting, Inc., ("Business Moves"). These include: two violations of the New York right of privacy (N.Y. Civ. Rights Law §§ 50-51); federal trademark infringement (15 U.S.C. § 1114(1)); two claims for false designation of origin and false representation under federal unfair competition law (15 U.S.C. § 1125(a)); violation of the New York Deceptive and Unfair Trade Practices Act (N.Y. Gen. Bus. Law § 349); commercial defamation under New York state law; and a claim for declaratory judgement of non-infringement.

Plaintiffs' proposed amended complaint ("PAC") seeks to adds a claim for cancellation of trademark registration, to expand their trademark infringement claims by adding allegations of defendants' use of additional variations of the WE THE BEST mark, and to revise the statutory basis for plaintiffs' right of publicity claims from New York law to Florida Law.

For the following reasons, the Court grants plaintiffs' motion in part and denies it in part.

I. Background

A. Allegations[1]

Plaintiffs allege that Mr. Bordenave and his company, Business Moves, intentionally appropriated the names and trademarks of Mr. Khaled, known professionally as "DJ Khaled," and his eighteen-month-old son, Asahd Tuck Khaled, to direct internet traffic to defendant's products. Dkt. 10 ("Compl.") ¶ 1–3. According to plaintiffs, defendants intentionally used and

[1] The account of the underlying facts and procedural history of this case is drawn from the parties' pleadings, as well as their submissions in support of and in opposition to the instant motion

applied to register trademarks for ASAHD, ASAHD COUTURE, A.S.A.H.D. A SON AND HIS DAD, and WE THE BEST LIFESTYLE in connection with their magazine publishing and apparel business. Compl. ¶ 3. Plaintiffs Khaled and ATK Entertainment Inc. — a Miami-based corporation named after Mr. Khaled's son — own registered trademarks in DJ KHALED (U.S. Trademark Registration No. 5,085,344), *Id.* ¶ 17, and WE THE BEST for a variety of goods and services (U.S. Trademark Registration Nos. 4,198,000; 5,031,701; 5,0320062; 5,341,520). *Id.* ¶ 30.

Mr. Bordenave is the founder and principal of Business Moves, a corporation incorporated in Mississippi with a place of business in Dallas, Texas. Business Moves is an apparel company that sells t-shirts with various logos and slogans via Instagram and its website. In addition to the trademark registrations at issue in the instant case, Business Moves and Mr. Bordenave also hold trademark rights in CARDI B (the name of another well-known hip-hop star), STORMI COUTURE (registered a month after Stormi Webster, the daughter of actress and model Kylie Jenner, was born), CYNTHIA BAILEY EYEWEAR (Ms. Bailey is a model and television personality), and Sirius (named after the popular satellite radio station), among others. *Id.* ¶ 39. Plaintiffs' allege that defendants' ownership of these marks indicates a pattern of infringing conduct, as none of these individuals authorized defendants' registration of these marks.

In July 2017, roughly nine months after Asahd's birth, defendants filed U.S. Application Serial Number 87/529,960 for ASAHD and U.S. Application Serial Number 87/529,865 for ASAHD COUTURE (for fragrance, skincare, and haircare products). *Id.* ¶ 40. Ten days later defendants filed Application Serial Number 87/541,379 for WE THE BEST LIFESTYLE. *Id.* ¶ 42. Shortly after this, defendants filed two additional trademark applications, U.S. Trademark

Registration No. 87/529,960 for ASAHD COUTURE (in connection with footwear and other clothing items) and U.S. Trademark Registration No. 87/867,012 for A.S.A.H.D. A SON AND HIS DAD. *Id.* ¶ 43. Defendants do not dispute these facts.

Plaintiffs allege, *inter alia*, that defendants have used the WE THE BEST mark and Asahd's name for commercial purposes without Khaled's or ATK's consent. *Id.* ¶ 47. They claim that defendants' use of the mark is intentionally fraudulent and intended to mislead consumers to believe there is an association between DJ Khaled and Asahd and defendants' merchandise and other services. *Id*. ¶ 45. Plaintiffs further allege that defendants have defamed ATK and harmed its business reputation by falsely claiming ownership of the ASAHD brand. *Id*. ¶¶ 54-7.

B. Procedural History

On June 8, 2018, plaintiffs filed their Complaint against Mr. Bordenave and Business Moves. Dkt. 10. On September 26, 2018, the Court entered a scheduling order which set October 26, 2018 as the deadline to amend pleadings. Dkt. 22. The Court also ordered that fact discovery be completed by January 23, 2019, *Id.*, though this deadline was later extended, at the parties' request, to April 26, 2019. Dkt. 32. Discovery is currently underway.

On January 9, 2019, plaintiffs filed a motion to amend their Complaint based on information discovered in preparation for a settlement conference before Magistrate Judge Debra Freeman on December 11, 2018. Dkt 33. Plaintiffs claim that preparation for the conference uncovered allegedly infringing uses of the WE THE BEST mark by defendants between November 2018 and January 2019, after the deadline to amend had passed. Dkt. 34 ("Pl. Mem.") at 3-4. Plaintiffs also claim that, in a discussion immediately preceding the December 11 conference, defendants' counsel questioned the validity of plaintiffs' right of privacy claims

under New York law. *Id.* at 4. Defendants disagree with plaintiffs as to the significance of these events, but do not dispute their description of them. Dkt. 39 ("Def. Memo.") at 9.

Plaintiffs then promptly notified defendants' counsel of their intent to file an amended complaint. Pl. Mem. at 4. The PAC was sent to defendants on December 21, 2018 with a request from plaintiffs that defendants consent to its filing. Plaintiffs then asked, on January 3, 2019, if defendants would consent to an extension of the deadline to amend the pleadings. Defendants' counsel denied both requests and plaintiffs filed the instant motion with the court. Pl. Mem. at 4.

II. Applicable Legal Standards

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend a complaint shall be "freely" given when "justice so requires," although "a district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. Dun & Bradstreet Corp*., 482 F.3d 184, 200–01 (2d Cir. 2007). However, when a scheduling order has been entered which has restricted a party's ability to file an amended complaint, Rule 15's liberal standard must be balanced against the more stringent standard of Rule 16, under which such an order "may be modified only for good cause." Fed.R.Civ.P. 16(b)(4); see also *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000); *Scott v. New York City Dep't of Corr.*, 445 Fed.Appx. 389, 390–91 (2d Cir. 2011) (summary order).

Thus, "despite the lenient standard of Rule 15(a), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause." *Parker*, 204 F.3d at 340; see also *Holmes v. Grubman*, 568 F.3d 329, 334–35 (2d Cir. 2009). To show good cause, a movant must

demonstrate that it has been diligent, see *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 266–67 (2d Cir. 2009); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003), meaning that, "despite its having exercised diligence, the applicable deadline could not have been reasonably met." *Sokol Holdings, Inc. v. BMB Munai, Inc.*, No. 05–cv–3749, 2009 WL 2524611, at *7, 2009 U.S. Dist. LEXIS 72659, at *24 (S.D.N.Y. Aug. 14, 2009) (citing *Rent–A–Center Inc. v. 47 Mamaroneck Ave. Corp.*, 215 F.R.D. 100, 104 (S.D.N.Y. 2003)). A party fails to show good cause when the proposed amendment rests on information "that the party knew, or should have known, in advance of the deadline." Sokol Holdings, 2009 WL 2524611, at *8, 2009 U.S. Dist. LEXIS 72659, at *24 (collecting cases); see also *Lamothe v. Town of Oyster Bay*, No. 08–cv–2078, 2011 WL 4974804, at *5–6, 2011 U.S. Dist. LEXIS 120843, at *15–16 (E.D.N.Y. Oct. 19, 2011).

III. Discussion

A. Claim for Trademark Cancellation

Plaintiffs seek first to add a claim for cancellation of a registered trademark. Plaintiffs allege that, while preparing for the settlement conference on December 11, they learned that the United States Patent and Trademark Office ("USPTO") had issued Registration No. 5,623,865 to defendants for ASAHD COUTURE. At the time of the initial Complaint's filing, the trademark application had been filed, but not yet approved. As such, the Complaint alleged only that defendants had applied to register the trademark in violation of plaintiff's rights. Plaintiffs now seek to amend the complaint to include cancellation of the trademark registration that has since been issued.

Defendants argue that because plaintiffs knew that the trademark application for ASAHD COUTURE had been accepted by the USPTO at the time the Complaint was filed, "the need for

action [against the registration] could have been described in the Complaint before the deadline expired." Def. Mem. at 1. Defendants further contend that plaintiffs should have filed an opposition directly with the USPTO against the trademark application before the Complaint was filed, and that failure to do so demonstrates a lack of diligence. *Id.* at 8-9.

In deciding whether to allow an amended complaint after the scheduling order deadline, "the primary consideration is whether the moving party can demonstrate diligence." *Kassner v. 2nd Ave. Delicatessen Inc.,* 496 F.3d 229, 244 (2d. Cir. 2007). Courts may also consider other factors, such as "whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants." *Id.* Plaintiffs argue that they have been diligent given that they could not have included a claim for trademark cancellation for a trademark that had not yet been registered at the time of initial Complaint. After learning of the trademark's issuance on December 4, 2018, plaintiffs allege—and defendants do not dispute—that defendants were informed of plaintiffs' intent to amend the complaint at the December 11 conference. Plaintiffs then sent the PAC to defendants on December 21, 2018, and this motion was filed with the court on January 9, 2019. Thus, the question is whether plaintiffs were diligent in the four weeks between the USPTO's registration of defendants' trademark and the filing of this motion. The Court concludes that plaintiffs were diligent and have demonstrated good cause under Rule 16 for the delay in adding claims for cancellation of defendant's trademark for ASAHD COUTURE.

Defendants argue that, because plaintiffs knew of the pending trademark application, they could have acted in anticipation of its eventual registration in the original Complaint. This Court disagrees. Absent bringing a conditional claim that, should the USPTO issue a registration to defendants for ASAHD COUTURE they would like to bring an action for cancellation, it is

unclear how plaintiffs could have brought action against the unissued trademark. Plaintiffs are not required to anticipate every potential claim that could arise due to future changed circumstances. Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically."). Instead, the Federal Rules of Civil Procedure provide a mechanism by which parties can adjust their claims to address new factual information: Rule 15.

Defendants further contend that plaintiffs should have filed an opposition directly with the USPTO against the trademark application before the Complaint was filed. While Defendants are correct that plaintiffs had the ability to file an opposition to the Notice of Allowance issued by the USPTO in February 2018, they cite to no legal authority to support their assertion that plaintiffs' failure to take advantage of an unrelated administrative proceeding precludes a finding of diligence. On the contrary, the language of the Lanham Act empowers courts to issue cancellations only of *registered* trademarks, not pending applications, 15 U.S.C § 1115, and courts in other districts have rejected the argument that a district court can interfere with or direct the rejection of a pending trademark application. *See Universal Tube & Rollform Equip. Corp. v. YouTube, Inc.,* 504 F.Supp.2d 260, 266 (N.D.Ohio 2007); *Whitney Information Network, Inc. v. Gagnon,* 353 F.Supp.2d 1208, 1211 (M.D.Fla. 2005) ("The Court concludes that in order to state a claim under these statutory provisions, one of the parties must hold a registered trademark with the USPTO; the existence of a pending application is not sufficient."); *GMA Accessories, Inc. v. Idea Nuova, Inc.,* 157 F.Supp.2d 234, 241 (S.D.N.Y. 2000) ("[B]y its terms, § 37 contemplates an action involving a registered trademark."); *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.,* 48 U.S.P .Q.2d 1385, 1386–87 (W.D.Wis. 1998). Even if plaintiffs knew of defendants' pending application prior to the November 19 deadline, they could not seek relief through the courts against the application until registration was issued. Accordingly, the Court

concludes that plaintiffs have demonstrated diligence in responding to the issued trademark registration.

In addition to diligence, courts can consider whether granting a motion to amend a complaint would cause undue prejudice to the non-movant—in this case, defendants. Defendants contend that granting plaintiffs' motion to amend would unduly prejudice them but raise concerns of prejudice only with regard to plaintiffs' second and third proposed amendments, not the addition of the cancellation of trademark claim. Def. Mem. At 9-10. The Court does not see how allowing plaintiffs to add the cancellation claim would prejudice defendants, as it should have no significant impact on the scope of discovery or preparation necessary for trial. Nor is it likely that the addition of the cancellation claim will delay resolution of the dispute. Consequently, plaintiffs' motion to amend the complaint to include a claim for trademark cancellation of defendant's trademark in ASAHD COUTURE is granted.

B. Additional Claims for New Uses of WE THE BEST

The second amendment that plaintiffs propose is adding allegations concerning additional, recently discovered uses of the mark WE THE BEST by defendants, purportedly in violation of plaintiffs' registered trademark in WE THE BEST. Plaintiffs contend that they "recently learned that Defendants have . . . repeatedly used additional WE THE BEST formatives, such as #WETHEBEST and #WETHEBESTBRANDS, as hashtags to advertise products in social media — notably including a barrage of posts containing such hashtags…after the deadline to amend had passed." Pl. Mem. at 4. Plaintiffs thus seek to expand the claims brought in the complaint to include defendants' uses of WE THE BEST formatives in social media posts between November 2018 and January 2019. In contrast, the original Complaint

sought relief solely for Defendant's improper use of WE THE BEST LIFESTYLE, in violation of plaintiffs' registered trademark in WE THE BEST. Compl. at ¶¶ 47-9, 58-9.

The PAC adds claims against WE THE BEST BRANDS and replaces all references to WE THE BEST LIFESTYLE with "WE THE BEST formatives" or variants thereof. For example, paragraph 47 of the original complaint alleges that "Defendants have not obtained written consent from Plaintiffs or any representative of the Plaintiffs to use the ASAHD name and mark and WE THE BEST LIFESTYLE mark." Compl. at ¶ 47. The amended paragraph reads: "Defendants have not obtained written consent from Plaintiffs or any representative of the Plaintiffs to use the ASAHD name and mark and WE THE BEST formatives." PAC at ¶ 47. In short, plaintiffs seek to amend the complaint to include conduct that is a continuation of that originally alleged. Plaintiffs argue that because "the Complaint already demands that Defendants be enjoined from using "the WE THE BEST MARK *or any colorable imitation thereof*, including, *without limitation*, WE THE BEST LIFESTYLE," Pl. Mem. at 7 (emphasis in original), allegations regarding additional uses of WE THE BEST-formative marks will have no impact on discovery, which has included all uses of WE THE BEST by defendants. *Id.*

Defendants argue first in opposition that, because the proposed amendment concerns continuations of conduct alleged in the original complaint, plaintiffs could have included these allegations from the start and did not show diligence in seeking to amend. Def. Mem. At 3. Second, defendants raise a valid concern that treating continued use as a new fact sufficient to justify amending a complaint could support amendment in almost any action. Finally, defendants argue that, even if this court finds that plaintiffs acted diligently, this amendment to the complaint is futile because plaintiffs have failed to show that hashtag use is trademark infringement.

Despite defendants' concerns, we conclude that plaintiffs acted diligently in seeking to amend. Plaintiffs notified defendants of their intention to amend the complaint almost immediately upon discovery of the continued conduct and filed this motion with the court within two months. This timeline is consistent with other findings by courts in this circuit of diligence in seeking to amend. *See Perfect Pearl Co v. Majestic Pearl & Stone, Inc.*, 889 F.Supp. 2d 453, 456, 458 (S.D.N.Y. 2012) (plaintiff acted diligently in moving to amend a complaint two months after learning of underlying facts); *Beastie Boys v. Monster Energy Co.*, 983 F.Supp. 2d 354, 360-61 (S.D.N.Y. 2014) (plaintiffs acted diligently in seeking to add a complaint approximately four months after learning of underlying facts because they had raised the facts with defendants and the Court within one month of learning of them).

Furthermore, allowing plaintiffs to amend will not unduly prejudice defendants. When assessing prejudice, courts consider whether the proposed amendment would "require the opponent to expend significant additional resources to conduct discovery and prepare for trial" or "significantly delay the resolution of the dispute." *Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 284 (2d Cir. 2000) (citation omitted). Plaintiffs represent, and defendants do not dispute, that the proposed amendment will not require additional discovery as the proposed claims for continued use of WE THE BEST-formatives between November 2018 and January 2019 are premised on allegations found in the original complaint.

Finally, we disagree with defendants' claims that the proposed amendments are futile because they fail to establish that hashtag use is trademark infringement. A proposal to amend a complaint is futile if the proposed amended complaint would fail to state a claim on which relief could be granted. *Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir.2002); see also *Gorham–DiMaggio v. Countrywide Home Loans, Inc.*, 421 Fed.Appx. 97,

101 (2d Cir.2011) (summary order). The plaintiffs' original complaint contains allegations of infringing hashtag use, Compl. ¶¶ 3, 45, 69, 82, and the PAC contains allegations of continuations of this infringing practice. Defendants do not claim that the allegations of hashtag use in the initial Complaint are invalid for failure to state a claim, and so the PAC, because it does not advance a new theory but merely adds new examples of an already alleged infringing practice, does not warrant a consideration of futility.

Moreover, even if the proposed amendments did not duplicate claims from the original complaint, defendants have failed to show futility. It is the burden of the party opposing the amendment to demonstrate that a proposed amendment would be futile. *Max Impact, LLC v. Sherwood Grp., Inc.,* 2012 WL 3831535 at *1 (S.D.N.Y. 2012). Defendants claim that "plaintiffs have not shown that the new claims are not futile" because "plaintiffs have not shown that the hashtag uses are trademark infringements." Def. Mem. At 7. This misunderstands the plaintiffs' role as the movant in a motion to amend. It is not the plaintiffs' responsibility to show non-futility.

Finally, plaintiffs note and the court highlights that numerous courts have found that hashtag use is a valid basis for trademark infringement and have allowed cases alleging such claims to proceed. *See, e.g., Chanel v. WGACA, LLC*, 2018 WL 4440507 at *2 (S.D.N.Y. 2018) (finding that plaintiffs plausibly alleged that defendant's use of the hashtag #WGACACHANEL was trademark infringement); *Pub. Impact, LLC v. Bos. Consulting Grp., Inc.*, 169 F. Supp. 3d 278, 294-295 (D. Mass 2016) (finding that use of the hashtag #publicimpact likely infringed on plaintiff's PUBLIC IMPACT trademark); *Fraternity Collection, LLC v. Fargnoli*, 2015 WL 1486375, at *5-6 (S.D. Miss. 2015) (finding that use of #fratcollection and #fraternitycollection could plausibly infringe on plaintiff's FRATERNITY COLLECTION trademark).

For the foregoing reasons, the Court grants plaintiffs' motion to amend the complaint to include claims of recently discovered uses of the WE THE BEST mark by defendants.

C. Revision of Statutory Basis for Right of Publicity Claims

Plaintiffs' final proposed amendment involves changing the statutory basis for the right of publicity claims from New York law to Florida law. The Court finds no compelling reason to grant this motion.

As this court noted in *Sokol Holdings*, "examples of a party's failure to act with sufficient diligence include basing a proposed amendment on information that the party knew, or should have known, in advance of the deadline." *Sokol Holdings*, 2009 WL 2524611, at *8. Plaintiffs are, and have been, aware that Asahd Tuck Khaled and Khaled M. Khaled are Florida residents and that ATK is a Florida corporation. No discovery of changed or relevant facts underlies plaintiffs' motion to amend the right of publicity claims from New York to Florida law. In fact, plaintiffs themselves note that "the factual allegations...for right of publicity violations under Florida law are substantively identical to those alleged in…right of privacy claims under New York law." Pl. Mem. at 7. Instead, plaintiffs discovered during the settlement conference on December 11, 2018 that defendants intended to challenge the applicability of New York law. Only after the conference did plaintiffs decide to change the statutory basis for the right of publicity claims to Florida law.

The Court agrees with defendants that plaintiffs cannot use the settlement conference as a "sounding board to assess how well legal issues will be received." Def. Mem. at 9. Plaintiffs either were or should have been aware that the right of publicity claims could have been brought pursuant to Florida law in the initial Complaint, and presumably chose to bring them under New York law for strategic reasons. Plaintiffs cannot now recast their allegations for fear of legal

challenge. The Court agrees with defendants that allowing plaintiffs to amend their complaint in light of legal arguments raised during a settlement conference would have the adverse effect of discouraging parties from revealing their legal assessments of claims during such conferences. Accordingly, the Court denies plaintiffs' motion to amend the complaint regarding the right of publicity claims.

Conclusion

For the foregoing reasons, Plaintiffs' motion for leave to amend its complaint is granted in part and denied in part. Plaintiffs may add a claim for cancellation of defendants' Trademark Registration for ASAHD COUTURE. Plaintiffs may also add allegations concerning uses of the mark WE THE BEST by defendants after the initial complaint was filed. Plaintiffs may not, however, revise the statutory basis for their right of publicity claims. Plaintiff is afforded three business days to file an amended complaint consistent with this Opinion on the docket of this case.

I wrote this brief in July 2021 while working for the Appeals Division of the New York City Law Department. It is being used as a writing sample with the knowledge and permission of my supervisors and has been lightly edited only for formatting and compliance with the NYCLD's style guide, not for substance. For purposes of this writing sample, I have omitted the brief's table of contents and table of authorities.

This case concerned transcripts from three criminal trials that the then-defendant, now plaintiff-appellant, was required by the trial court (Supreme Court) to produce as part of his civil claim for malicious prosecution and false arrest. Due to his repeated failure to comply with the orders requiring production of the transcripts, the trial court dismissed the case. Here, plaintiff-appellant argued that it was never his burden to produce the transcripts and the case was wrongfully dismissed. I argued on behalf of the City that the repeated failure to comply justified the trial court's dismissal.

PRELIMINARY STATEMENT

Plaintiff-Appellant Tyrone Larkin commenced this action in February 2007, alleging personal injuries resulting from his arrest in January 2003 and subsequent prosecution for criminal sale of a controlled substance and criminal sale of firearms. From July 2011 to April 2014, Supreme Court ordered Larkin to produce the transcripts from his criminal trials three times, but he failed to comply. Then, in November 2014, New York County Supreme Court (Chan, J.) issued a conditional order, directing Larkin to produce the transcripts within 30 days, or have his complaint automatically dismissed. But he did not produce the transcripts, and the complaint was dismissed.

Over the next four years, Larkin made intermittent attempts to vacate the dismissal, while still failing to comply with the court's discovery orders. He first filed a procedurally improper motion and then, a year and a half later, filed a corrected motion, but failed to appear twice for oral argument. Finally, in November 2019, the court (Frank, J.) denied Larkin's motion to vacate the November 2014 order. Larkin now appeals that order.

This Court should affirm. As Supreme Court providently reasoned, Larkin failed to show that he should be relieved of the consequences of his eight-year failure to comply with discovery orders, including a self-executing conditional order. At the time he filed his motion to vacate, Larkin still had not complied with those orders or offered a reasonable excuse for that failure. Nor is there any evidence in the record

that Larkin ever made a good-faith attempt to comply with the orders and obtain the transcripts.

On appeal, Larkin contends that he had a reasonable excuse for failing to comply with the conditional order because the court could not require him to produce transcripts that he did not have. But there is no record of Larkin making that argument to Supreme Court when it issued the order. And even if he did, his disagreement with the order would not provide him with a reasonable excuse for failing to comply once the issue had been resolved against him. In any event, the argument is incorrect, and the conditional order was well within Supreme Court's discretion.

QUESTION PRESENTED

Did Supreme Court providently exercise its discretion in denying Larkin's motion to vacate, where Larkin failed to offer any reasonable excuse for his eight-year failure to comply with the court's discovery orders that would warrant relieving him of the consequences of that failure?

STATEMENT OF THE CASE

In January 2003, Larkin was arrested and charged with criminal sale of a controlled substance and criminal sale of firearms (Record on Appeal ("R") 277-78). Following his arrest, Larkin was the subject of a grand jury trial and three felony trials which resulted, respectively, in a hung jury, a mistrial, and, finally, an acquittal in December 2005 (R12).

After his acquittal, Larkin commenced this action in February 2007, seeking damages for injuries stemming from his arrest and subsequent prosecution (R277-

290). The petition alleged that Larkin suffered psychological damage, including fear and anxiety, as a result of malicious prosecution, false arrest, defamation of character, and civil rights violations by the City and its officers (*id.*). At that time, Larkin also filed an order to show cause to serve a late notice of claim, which Supreme Court (Rakower, J.) granted in March 2007 (R161).

A. Larkin's failure to comply with three discovery orders from July 2011 through April 2014

In September 2010, Supreme Court (Kern, J.) issued the first Case Scheduling Order ("CSO") in the case, which required Larkin "to provide a copy of the criminal court files and certificate of disposition with[in] 45 days" (R176). Following this initial order, Supreme Court issued nine more discovery orders.

As Supreme Court would later explain, the main dispute at the underlying conferences was which party should be required to provide the transcripts of the criminal trials on which Larkin's malicious prosecution claims were based (R6). Apparently, neither party had the full transcripts, and the court ultimately held that the obligation should be Larkin's *(id.*). Indeed, Supreme Court would ultimately issue four orders explicitly ordering Larkin to provide his criminal trial transcripts (R419, 425, 426, 430).

Supreme Court issued its first order in July 2011, directing Larkin to provide the transcripts or swear an affidavit that he did not have them (R418). No such affidavit appears in the record, however, and the court subsequently ordered Larkin to produce the transcripts twice more, in February 2014 and April 2014 (R425, 426).

Although the court once made the scheduling of a deposition contingent on either party's success in obtaining the transcripts beforehand (R421), and another time encouraged both parties to obtain the transcripts (R424), the court never ordered the City to produce them, only Larkin. Indeed, Larkin's December 2012 response to a Notice of Discovery and Inspection confirms that Larkin was on notice that he needed to produce the transcripts. The response stated that he was in the process of obtaining copies but did not provide further detail (R372-75).

To the extent that Larkin objected to Supreme Court's orders, there is no indication in the record that he took protective action to relieve himself of any obligation to comply with them. For example, there is no record of any motion to vacate based on an argument that he could not be required to comply with the orders, nor does Larkin appear to have appealed the orders.

B. The November 2014 conditional order dismissing the complaint and Larkin's four-year failure to file a timely and proper motion to vacate

After Larkin's repeated failures to comply with its orders, Supreme Court (Chan, J.) issued one final discovery order in November 2014 directing him to produce the transcripts within 30 days or have his complaint dismissed (R430). Yet again, Larkin did not comply, and the City followed up with a letter reminding him of the terms of the November 2014 order and requesting, again, that he provide the transcripts (R431). Still, Larkin did not comply. As a result, his complaint was automatically dismissed by operation of the order, and the City then served notice of entry of the order (R437), and an affirmation of non-compliance (R438-39).

Over the next four years, and without ever complying with the discovery orders, Larkin filed two motions seeking to avoid the consequences of the conditional order. But the first was procedurally improper and untimely, and Larkin defaulted on the second.

Larkin's first motion was a motion to reargue the conditional order, which he waited to file until three days *after* the expiration of the 30-day compliance period established by the November 2014 order (R186). Larkin contended that Supreme Court could not require him to pay for the transcripts, and that the burden should fall on the party seeking them—that is, the City (R194). Supreme Court (Chan, J.) rejected the motion in May 2015 on the grounds that Larkin "sought relief that was improper for said motion to reargue" under CPLR 2221 (R195). Supreme Court explained that Larkin in fact sought relief from its prior order automatically dismissing the complaint, and that the correct provision was thus CPLR 5015(a). The court then denied the motion without prejudice so that Larkin could refile under the proper statute (R389).

Larkin nonetheless made no more motions for a year and a half. Instead, in December 2016, over two years after Supreme Court issued the conditional order, he filed a motion to vacate it (R446). In support of his motion to vacate, Larkin argued—apparently for the first time—that he was unable to comply with the Supreme Court's repeated discovery orders because he was not in possession of the requested transcripts (R199). Larkin again argued, as he had in his motion to reargue, that

Supreme Court had erred in requiring him to bear the cost of producing the transcripts (*id.*).

Supreme Court scheduled oral argument on the motion for January 2018 (R393), but Larkin did not appear or provide an explanation for this absence. Argument was rescheduled for March 2018 but was adjourned due to inclement weather (R358). Supreme Court rescheduled oral argument for a third time for April 2018. Once again, Larkin failed to appear, claiming that the date of the hearing had been mis-calendared by his counsel's office (R301). Given Larkin's second failure to appear at oral argument, Supreme Court (Tisch, J.) denied his motion to vacate due to his non-appearance (R395).

C. The Supreme Court's order denying Larkin's motion to vacate the November 14 conditional order and striking his complaint

After Supreme Court rejected his first two attempts to avoid the consequences of his noncompliance with its November 2014 conditional order, Larkin filed another order to show cause in November 2018 (R295). This time, he asked the court to relieve him of the consequences of the April 2018 order denying his motion to vacate and to restore the case to the pretrial calendar so that his motion to vacate the conditional dismissal order could be heard (R296). He argued that he should be relieved from the consequences of the April 2018 order because he had a reasonable excuse for his default and a meritorious defense: that his counsel's office had failed to properly calendar the oral argument (R303).

The City opposed the motion and filed a motion requesting a formal order dismissing the complaint (R356-361; R396-407). The City argued that the conditional order from November 2014 was fully proper, and that the court had discretion to dismiss the complaint given that Larkin had failed to comply with myriad discovery orders over the course of 4 years, and because the November 2014 order put him on notice of the potential dismissal (R359-60, 399-400). Indeed, under established precedent, the court could properly infer from Larkin's conduct that it was willful and contumacious (R401-05). Moreover, in the intervening years, Larkin had ample opportunity to vacate the order via motion but failed to move for vacatur within a reasonable time and then failed, twice, to appear for oral argument (R360, 400-01).

Supreme Court (Frank, J.) granted Larkin's motion to restore the case to the pretrial calendar (R6) but denied Larkin's motion to vacate (R5-7). Because denying the motion to vacate left the 2014 conditional order's dismissal of the complaint intact, the court denied the City's motion to dismiss as moot (*id.*).

Supreme Court reasoned that, while New York state courts prefer to resolve cases on the merits, "where there has been a failure to abide by a court order for over 8 years, and a conditional order was issued and not complied with, dismissal is warranted" (*id.* at 2-3). The court emphasized that Larkin had been provided ample opportunity to have the underlying dispute resolved on the merits but had failed repeatedly to comply with the court's directives (*id.* at 2).

The Order noted that it is undisputed that Supreme Court had determined that the burden for producing the criminal court transcripts was Larkin's to bear (*id.*

at 2). And, while Larkin produced some material that was relevant to the discovery orders, he did not provide the transcripts, instead taking the position at each oral argument that he was not required to do so despite the numerous Court orders (*id.* at 1-2). The November 2014 order gave Larkin one final opportunity to provide the transcripts, and he failed to comply (*id.* at 3). Given that "it was well within the Court's discretion back in 2011 to require [Larkins] to produce the transcripts" (*id.*), and that self-executing conditional orders are deemed absolute upon a party's non-compliance (*id.* at 2), the Court denied Larkin's motion to vacate the November 2014 order and struck the complaint (*id.* at 3).

ARGUMENT

SUPREME COURT PROVIDENTLY DENIED LARKINS' MOTION TO VACATE THE CONDITIONAL ORDER DISMISSING HIS COMPLAINT

Although Larkin characterized his motion as one for relief from an order based on the reversal, modification, or vacatur of a prior order or judgment on which it was based (R446), that motion was not available to him because the November 2014 conditional order had not been reversed, modified, or vacated. *See* CPLR 5015(a)(5); *Long Island Lighting Co. v. Century Indem. Co.*, 52 A.D.3d 383, 384 (1st Dep't 2008). Larkin correctly recognizes on appeal that his motion is properly evaluated according to the standards for a motion seeking relief from a default (Brief of Plaintiff-Appellant ("App. Br.") at 14). *See* CPLR 5015(a)(1); *Anderson & Anderson LLP-Guangzhou v. N. Am. Foreign Trading Corp.*, 165 A.D.3d 511, 512 (1st Dep't 2018) (applying this

standard to reject the plaintiff's request for relief from the consequences of failure to comply with a conditional discovery order).

But Larkin is not entitled to that relief. CPLR 5015(a)(1) provides that a court may relieve a party of a judgment or order where, among other things, the moving party demonstrates a reasonable excuse for the default. *Caba v. Rai*, 63 A.D.3d 578, 578 (1st Dep't 2009). Here, it was well within Supreme Court's broad discretion to conclude that Larkin had not. *See Henry Rosenfeld, Inc. v. Bower & Gardner*, 161 A.D.2d 374 (1st Dep't 1990) (denial of motion under CPLR 5015(a)(1) reviewed for abuse of discretion). The court had ordered him to provide the transcripts from his criminal trials four different times over three years, but Larkin failed to comply with those orders, and with a conditional order automatically dismissing his complaint if he did not comply. Then, over the next four years, Larkin made sporadic attempts to avoid the consequences of that order, while still failing to comply. Thus, despite ample opportunity to cure his default, Larkin has never done so, and Supreme Court was not required to excuse his cavalier response to its orders.

On appeal, Larkin primarily insists that Supreme Court should not have entered the discovery orders as an initial matter because it could not order him to produce discovery that was not in his possession, but that argument is unpreserved and meritless. In objecting to the orders below, Larkin made a different argument, and in any event, Larkin's disagreement with the orders did not excuse his failure to comply with them once they had been entered. Moreover, Larkin's new contention

relies on a misunderstanding of the cases he cites, and the conditional order was fully proper.

A. Larkin failed to show that his failure to comply with the November 2014 conditional order was excusable

Supreme Court providently determined that Larkin had not shown that vacatur of the conditional order striking his complaint was proper. At the time the court issued its conditional order, Larkin did not provide a reasonable excuse for his failure to comply the 2014 conditional dismissal order. Nor did he offer one in his motion for the court to relieve him of his consequences for his failure to comply with that dismissal. For example, Larkin did not claim that he was unaware of the conditional order, or that he did not understand that Supreme Court had held several years before, over his objection, that it was his obligation to produce the transcripts. Nor did he claim that he had made diligent efforts to comply with Supreme Court's order, but failed.

Instead, as the record makes clear, Larkin was well aware of the conditional order, and of the earlier orders directing him to produce the transcripts. As early as December 2012, he told defendants that he was making efforts to obtain the transcripts (R372). But he apparently opted not to follow through with that representation, or to comply with the court's orders either when it first issued them or when his complaint was struck for failing to comply with them. And he still has not complied.

Instead, Larkin has repeatedly taken the position that he is excused from complying with the orders because Supreme Court erred in issuing them as an initial matter (R11, 199). But as this Court recently reaffirmed, disagreement with a court's discovery orders is "not a reasonable excuse for [that party's] failure to comply with [the court's] directives." *Jones v. Fegs-Wecare/Human Res.*, 194 A.D.3d 523, 524 (1st Dep't 2021); *accord Anderson & Anderson LLP-Guangzhou*, 165 A.D.3d at 512.

Indeed, if Larkin disagreed with the court's first three discovery orders directing him to produce the transcripts, he could have taken action at that time. For example, he could have appealed the orders or, if an appeal did not lie, sought to vacate them and then appealed the denial. It was not reasonable for him to knowingly and willfully ignore four discovery orders, including a conditional order dismissing his complaint, over three years. And Supreme Court was not required to relieve Larkin of the consequences of that conduct. *See Jones*, 194 A.D.3d at 524; *Anderson & Anderson LLP-Guangzhou*, 165 A.D.3d at 512.

That is especially so where Larkin has continued to display a cavalier attitude toward Supreme Court's orders even after the complaint was struck. Larkin did not take any action within the thirty-day period set by the conditional order, but waited until after the period expired to seek reargument (R8-9). Then, when Supreme Court informed him that reargument was an improper procedural vehicle, he waited another year and half before filing a motion to vacate (R196-97). And when he did file it, he failed to appear for two oral arguments on his own motion, resulting in its

dismissal and requiring Larkin to file a third motion to relieve himself of the consequences of his successive defaults.

On appeal, Larkin's primary contention continues to be that Supreme Court erred in resolving the discovery dispute as it did (*e.g.* App. Br. 11-12). But as already explained, that is not a reasonable excuse. It is also incorrect, as explained below.

Larkin also briefly asserts, in his preliminary statement, that he "could not obtain" the transcripts and that he did not have the financial means to obtain them (App. Br. 1-2). But the record contains no indication that Larkin ever made any showing below that he could not obtain the transcripts, but only that he *should not* be required to obtain the transcripts. The argument is thus unpreserved. *See Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D.3d 538, 539 (1st Dep't 2015) (arguments may not be raised for the first time on appeal). In any event, he cites no record support or provides any further detail for this argument. It therefore cannot constitute a reasonable excuse. *See Reidel v. Ryder TRS, Inc.*, 13 A.D.3d 170, 171 (1st Dep't 2004); *Montgomery v. Colorado*, 179 A.D.2d 401, 402 (1st Dep't 1992); *Periphery Loungewear*, 214 A.D.2d 428 (1st Dep't 1995).

Although Larkin did claim in his 2015 reargument motion that he could not afford the transcripts (R11), he did not make that argument in the motion to vacate that is the subject of this appeal, and it is therefore also unpreserved. In any event, before Supreme Court, as on appeal, Larkin wholly failed to substantiate or explain this contention as well, and it therefore is not a reasonable excuse. Larkin provided no detail or substantiation of the actual costs of the transcripts, nor did he provide

any detail about the state of his finances. Indeed, as the City argued in Supreme Court, if Larkin could not afford to produce the transcripts of the trials that served as the basis for his own claim, there were procedural protections available to him (R253). But having failed to avail himself of those protections, his conclusory assertions that he could not afford the transcripts do not constitute a reasonable excuse.

Next, Larkin implies that he was not, in fact, ordered to produce the transcripts, and that the burden of production was instead placed on both parties (App. Br. 17). This contention misunderstands the record. The initial CSO placed the burden on Larkin to produce the criminal file (R176), and four subsequent orders (from 07/2011, 02/2014, 04/2014, and 11/2014) expressly placed the burden on Larkin to produce the transcripts from his criminal trials (R176, 178, 183-85). And as the December 2012 discovery response confirms, Larkin understood producing the transcripts to be his obligation (R372). The two orders Larkin cites—from March 2012 and October 2013—merely make a deposition contingent on any party obtaining the transcripts and encourage all parties to make efforts to obtain the transcripts (R179, 181). Neither order placed the onus on the City, and even if they had, they were plainly superseded by multiple orders requiring Larkin to do so (R425, 426, 430). Larkin has thus failed to come forward with a reasonable excuse for his failure to comply.

B. In any event, the November 2014 conditional order was fully within the court's discretion.

Because Larkin's disagreement with the discovery orders did not provide a reasonable excuse to ignore them, this Court may, and should, affirm the denial of Larkin's motion on that ground. In any event, to the extent that Larkin insists that the order was legally erroneous, his contentions are meritless.

"[C]ourts have the inherent power, and indeed responsibility, so essential to the proper administration of justice, to control their calendars and to supervise the course of litigation before them." *Catalane v. Plaza 400 Owners Corp.*, 124 A.D.2d 478, 480 (1st Dep't 1986). Accordingly, CPLR 3126 grants courts broad discretion to impose such penalties "as are just" on a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." Penalties include prohibiting the party from presenting testimony or evidence at trial, *see* CPLR 3126(2), or striking the party's pleading, *see* CPLR 3126(3). "[A] penalty imposed pursuant to CPLR 3126 should not be readily disturbed absent a clear abuse of discretion." *Fish & Richardson, P.C. v. Schindler*, 75 A.D.3d 219, 220 (1st Dep't 2010).

An order striking the pleadings under CPLR 3126(3) is warranted where the court determines that the non-compliance is willful and contumacious or in bad faith. *See Pimental v. City of New York*, 246 A.D.2d 467, 468 (1st Dep't 1998); *Furniture Fantasy, Inc. v. Cerrone*, 154 A.D.2d 506, 507 (2d Dep't 1989). This Court has repeatedly held that willful and contumacious conduct may be inferred from a recurring failure to comply with disclosure orders. *See, e.g., Keller v. Merchant*

Capital Portfolios, LLC, 103 A.D.3d 532, 532 (1st Dep't 2013) ("[Plaintiff's] failure to comply with three court orders directing it to produce certain materials—one of which was a conditional order striking its answer if [he] did not comply within 45 days—warrants an inference of willful noncompliance"); *Rodriguez v. United Bronx Parents, Inc.*, 70 A.D.3d 492, 492 (1st Dep't 2010) ("[P]laintiff established that defendant's failure to comply was willful and contumacious, given its repeated and persistent failure to comply with five successive disclosure orders."). If the evidence supports an inference of willful and contumacious failure to comply with discovery orders by a party, it is the party's burden to come forward with a reasonable explanation for that failure. *See Anderson & Anderson LLP-Guangzhou*, 165 A.D.3d at 512; *Pimental*, 246 A.D.2d at 468.

Applying these standards here, Supreme Court's conditional order was fully proper. Over the course of the preceding three years, Larkin had failed to comply with three separate court orders directing him to produce the transcripts from his criminal trial. If he failed to comply with the conditional order, he would fail to comply with a fourth. Supreme Court could properly infer from those repeated failures to comply that his conduct was willful and contumacious, and his apparent disregard for his discovery obligations and for Supreme Court's disclosure orders warranted the striking of his complaint. *See Fish & Richardson*, 75 A.D.3d at 219 ("If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." (quoting *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123 (1999))). Indeed, this Court has found the striking of a party's pleadings to be

proper based on similar, and even fewer, failures to comply with court orders. *See, e.g.*, *Reidel v. Ryder TRS, Inc.*, 13 A.D.3d at 171 (failure to appear for three depositions scheduled by three court orders constituted willful and contumacious conduct warranting striking of pleading); *Flores*, 246 A.D.2d at 467 (striking pleading where party failed to obey one discovery order).

Larkin's failure to comply with a conditional order further supports dismissal. On facts similar to these in *Santiago v. City of New York*, this Court upheld Supreme Court's dismissal of the complaint "as a sanction for plaintiff's persistent, unexplained noncompliance with four disclosure orders, including a self-executing conditional order of dismissal that was granted on default and became absolute." 77 A.D.3d 561, 561 (1st Dep't 2010). *Accord Trabanco v. City of New York*, 81 A.D.3d 490, 491 (1st Dep't 2011) ("a conditional order becomes absolute upon a party's failure to comply with its provisions") (citing *Rampersad v. New York City Dept. of Educ.*, 30 A.D.3d 218 (1st Dept' 2006)). The conditional order here was clear that, should Larkin fail to produce the criminal court transcripts, his complaint would be dismissed, making it sufficiently specific to be enforceable. *Trabanco*, 81 A.D.3d at 491. But even absent his failure to comply with the conditional order, his behavior was willful and contumacious. *See Periphery Loungewear v. Kantron Roofing Corp.*, 214 A.D.2d 438 (1st Dep't 1995) (striking of answer warranted by defendant's failure to appear for deposition and violation of so-ordered stipulation); *Schneider v. City of New York*, 217 A.D.2d 610, 611 (2d Dep't 1995) ("A preliminary conference order is an order of the court and compliance with it should not be disregarded.").

As Supreme Court emphasized in its 2019 order denying the motion to vacate, Larkin failed to come forward with a reasonable excuse for his failure to comply, and his behavior instead confirmed that he was acting willfully. Larkin did not comply with Supreme Court's orders for several years after the court determined that production of the trial transcripts was Larkin's responsibility (R6-7). Larkin was thus given "ample opportunity" to comply but chose instead to ignore the court's orders. But instead of coming forward with a reasonable excuse for that failure, he repeatedly insisted that he should not have to produce the transcripts even after the issue had been resolved against him (*id.* at 1-2). That is the very definition of willful and contumacious conduct.

In any event, Larkin's arguments that he could not be required to comply with Supreme Court's order are meritless. At the time Supreme Court entered the conditional order, Larkin's only excuse for non-compliance was that the court purportedly lacked authority to require him to pay for and obtain the transcripts because the City was the party requesting them (*e.g.*, R11, 204). Larkin has now abandoned that contention on appeal, likely because it is wrong. This Court has in fact long held that the producing party may, and even should, be required to bear the costs of production. *See U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 63 (1st Dep't 2012) (holding that producing should bear initial costs of discovery, but courts may entertain applications party to shift fees); *Clarendon Nat'l Ins. Co. v. Atl. Risk Mgmt., Inc.*, 59 A.D.3d 284, 286 (1st Dep't 2009) ("We see no

reason to deviate from the general rule that, during the course of the action, each party should bear the expenses it incurs in responding to discovery requests.").

Larkin has now shifted to the argument that he could not be expected to produce transcripts he did not possess (App. Br. 11-12). But that argument first appears in the record for the first time in Larkin's 2016 motion to vacate, and if Larkin objected to the court's 2011 and 2014 discovery orders on that ground, he should have informed the court at that point. In any event, the cases Larkin cites do not establish that proposition, and establishing such a rule would not make sense.

Indeed, in several of the cases Larkin cites, the courts simply held that a party's failure to comply with a single discovery order was not willful and contumacious where the parties had made diligent efforts to obtain the evidence, or a diligent search for it. *See Byrne v. City of N.Y.*, 301 A.D.2d 489, 490 (2d Dep't 2003) (inability to identify all security personnel involved in incident not willful or contumacious where party substantially complied with the demand, provided detailed affidavits swearing that the party had conducted three more unsuccessful searches, and offered to assist in further efforts to obtain information); *LaManna v. MJ Cahn Woolen Co.,* 249 A.D.2d 451, 452 (2d Dep't 1998) ("[B]ecause the plaintiff is not in possession of the transcript at issue, despite her reasonable diligence in attempting to obtain it, the plaintiff has not exhibited a contumacious or willful disregard of the court order."); *Citibank N.A. v. Johnson*, 206 A.D.2d 942, 942 (4th Dep't 1994) ("[A]n officer of plaintiff stated that plaintiff had made a diligent search of its files and had provided defendant with all the requested documents that it

possessed."). They did not hold that Supreme Court could not require one of the parties to produce transcripts.

Moreover, Larkin made no such showing of diligence here. Only once, in a 2012 response to the City's Demand for Discovery and Inspection, did Larkin indicate that he intended to comply with the discovery order at all (R372). At no point in the ensuing 9 years did he provide further evidence of attempted compliance or show that he had made or intended to make a diligent effort to comply with the court's orders. Indeed, after his initial discovery disclosure in 2007 of the transcript excerpts already in his possession, Larkin provided no further materials from his criminal trial to the City.

In the other cases Larkin cites, the courts found that a party's failure to comply with discovery orders was not willful or contumacious where they showed that requested documents or information either did not exist or was not in their possession. *Bivona v. Trump Marina Hotel Resort*, 11 A.D.3d 574 (2d Dep't 2004); *Gatz v. Layburn*, 9 A.D.3d 348, 350 (2d Dep't 2004); *Bach v. City of N.Y.*, 304 A.D.2d 686, 687 (2d Dep't 2003); *Romeo v. City of N.Y.*, 261 A.D.2d 379, 380 (2d Dep't 1999); *cf. Vaz v. New York City Trans. Auth.*, 85 A.D.3d 902, 903 (2d Dep't 2011) (reiterating that a party could not be sanctioned for failing to produce information that it did not possess). For example, in *Gatz*, the court held that a plaintiff in an automobile accident case could not be sanctioned for failing to produce a police investigation report that he did not possess. *See Gatz*, 9 A.D.3d at 350.

But requiring Larkin to provide transcripts of his criminal trials is not comparable. Unlike the plaintiff in *Gatz*, who likely did not have had access to police investigation reports, Larkin should have been in possession of the transcripts of his criminal trials, and if he was not, he could obtain them by ordering them. Moreover, because the transcripts of the trials were critical to Larkin's malicious prosecution claim, one of the parties needed to produce them. Larkin has cited no authority for the proposition that Supreme Court could not order him to do so, especially considering that he was the one bringing a malicious prosecution claim, and the transcripts would be critical to his own case.

This case is thus much more like cases in which the parties failed to comply with repeated discovery orders. Where this Court has considered similar fact patterns, it has consistently held that dismissal was appropriate. *See Harris v. Kay,* 168 A.D.3d 419, 419 (1st Dep't 2019) (upholding Supreme Court's dismissal due to "plaintiff's repeated, willful and contumacious refusals to provide discovery and to comply with the court's orders over an approximately eight-year period"); *Goldstein v. CIBC World Mkts. Corp.*, 30 A.D.3d 217, 217 (1st Dep't 2004) (upholding *sua sponte* dismissal of plaintiff's complaint where "[p]laintiff's year-long pattern of noncompliance with the court's repeated compliance conference orders gave rise to an inference of willful and contumacious conduct"); *Macias v. New York City Transit Auth.*, 240 A.D.2d 196 (1st Dep't 1997) (upholding *sua sponte* dismissal of plaintiff's case, which was ten years old at the time, when plaintiff failed to comply with a preliminary conference order requiring her appearance at a deposition).

In his brief, Larkin insists that reliance on *Goldstein* and *Macias* is inappropriate here because those cases involved willful or contumacious conduct and this case does not (App. Br. 14-15). This, of course, begs the question of whether Larkin's conduct was willful and contumacious which, as demonstrated, it was. Furthermore, Larkin's attempts to distinguish those cases factually are unpersuasive. He claims that *Goldstein* is not on point because that case involved "repeated warnings of the possibility of dismissal" while this case involved only one, and because the plaintiff in *Goldstein* failed to challenge the dismissal in a subsequent motion to vacate, while Larkin did (App. Br. 17). Neither of these factual distinctions make *Goldstein* inapplicable here. Larkin, like the plaintiff in *Goldstein*, was on notice that noncompliance would result in dismissal. Further, that Larkin challenged the conditional order of dismissal does not mean that the Court could not reject that challenge, which it did.

Larkin's attempt to dismiss *Macias*' relevance is similarly unpersuasive as it depends on the assertion that, while the plaintiff in *Macias*' acted willfully in failing to comply with court orders, the record in this case "is clear that [Larkin's] conduct was not willful." In addition to being wholly conclusory, this is, as discussed above, simply untrue.

C. Larkin's remaining contentions lack merit

Larkin makes two additional arguments in opposition to dismissal, neither of which is persuasive. First, he argues that his submission of an Affidavit of Merit (R21) with his motion to vacate the November 2014 order excuses his noncompliance (App.

Br. 14). But this argument appears to misunderstand the affidavit of merit referred to in CPLR 5015(a)(1). That is an affidavit that there is merit to Larkin's claim, not that his legal challenge to Supreme Court's discovery orders had merit. *See Anderson & Anderson LLP-Guangzhou*, 165 A.D.3d at 512. Larkin does not appear to have submitted such an affidavit, and even if he had, he would still need to provide a reasonable excuse. *See* CPLR 5015(a)(1). He has not.

The second argument is Larkin's claim that Supreme Court's February 2019 order restoring his case to the pretrial calendar is "the law of the case" (App. Br. 15). The "law of the case" doctrine holds that a court's determination of a question of law in a given case is binding not only on the parties, but on all other judges of coordinate jurisdiction. *State Higher Educ. Services Corp. v. Starr*, 158 A.D.2d 771, 772 (3d Dep't 1990). Larkin contends that Supreme Court's decision to restore his case to the pretrial calendar was a legal determination subject to the law of the case doctrine. But Larkin fails to explain the applicability of the law of the case doctrine, which does not appear to have any relevance here. In restoring the case to the pretrial calendar, the court did not resolve any issue in Larkin's favor, and in fact subsequently denied the attendant motion to vacate. That the City did not appeal Supreme Court's decision to re-calendar the case does not somehow prevent it from defending the court's subsequent decision, which as the City has already shown, was entirely proper.

CONCLUSION

For the foregoing reasons, the Supreme Court's order denying Larkin's motion to vacate the automatic dismissal of his complaint should be affirmed.